95-1734

Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

M.H.,

Petitioner,

v.

T.J., M.D., and C.J.,

Respondents.

Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when a court has found a parent incapable of caring for a minor child and also has found, by clear and convincing evidence, the parent's refusal to consent to the child's adoption to be contrary to the child's best interests, the Federal Constitution mandates that a State court give conclusive effect to the parent's designation of a custodian for the child.

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PETITION FOR WRIT OF CERTIORARI

Petitioner M.H. respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Superior Court of the District of Columbia, Family Division (App. *infra,* 31a) is unreported. The District of Columbia Court of Appeals decision (App. *infra,* 1a), No. 94-FS-140, 94-FS-274, 94-FS-277 (D.C. Sept. 21, 1995), is unreported. The District of Columbia Court of Appeals order (App. *infra,* 41a), No. 94-FS-140, 94-FS-274, 94-FS-277 (D.C. Apr. 17, 1996), is unreported.

JURISDICTION

The Superior Court of the District of Columbia entered its judgment on January 14, 1994. (App. *infra*, 31a). The District of Columbia Court of Appeals decided the appeal in this case on September 21, 1995. (App. *infra*, 1a). The Court of Appeals denied petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on April 17, 1996, with two judges dissenting. (App. *infra*, 41a). The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. Amend. XIV, § 1:

> No State shall . . . deprive any person of life, or property, without due process of law . . . .

D.C. Code Ann. § 16-2301(9)(C):

> The term "neglected child" means a child:
>
> . . .
>
> whose parent, guardian, or other custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity . . . .

D.C. Code Ann. § 16-304(e):

> The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interest of the child.

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by a writ of

certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT

A. Factual Background

This action arises out of Petitioner's efforts to adopt T.J., a six-year-old child for whom she has cared for as a foster parent for the past four years.

According to the unchallenged findings of the trial court, T.J.'s mother is afflicted with chronic schizophrenia which renders her unable to provide and care for T.J. (App. *infra,* 32a-33a). During the first 19 months of his life, she periodically placed him with the District of Columbia Department of Human Services ("DHS") or with his great-aunt by marriage. (App. *infra,* 33a). T.J.'s mother would invariably make demands for his return, often accompanied by outbursts of violence toward the great-aunt. (App. *infra,* 33a). The great-aunt consistently returned T.J. to his mother in compliance with these demands. (App. *infra,* 33a).

When T.J. was nineteen months old, DHS filed a dependency petition alleging that he was a neglected child. At that time, his great-aunt refused to take care of him, stating that she feared his mother would again cause a disruption in her home or would become violent. (App. *infra,* 5a). T.J. was therefore placed in shelter care at St. Anne's Infant Home. On January 23, 1992, T.J. was adjudicated a "neglected child" due to his mother's mental illness, pursuant to D.C. Code Ann. § 16-2301(9)(C) (1981). He was committed to the custody of DHS on March 31, 1992.

As a result of this troubled infancy, T.J. was physically aggressive, speech-impaired to the point of being almost mute, deficient in behavioral and learning skills, in emotional development, and in language development. T.J. made no progress in these areas while he was placed at St. Anne's. Visits from T.J.'s extended family were minimal. (App. *infra,* 33a).

DHS placed T.J. in Petitioner's custody in March 1992. The record reflects that great strides were made in T.J.'s physical and emotional development, attributed by the trial court to Petitioner's exceptional care. (App. *infra,* 34a).

In July 1992, a DHS social worker suggested that Petitioner consider adopting T.J. The social worker also spoke with the great-aunt, who said she could not provide a home for T.J. (App. *infra,* 7a). On November 5, 1992 Petitioner filed for adoption. Six months later the great-aunt filed for custody of T.J., but she did not consider adoption.

B. Proceedings Below

In considering the cross-petitions for adoption and custody, Superior Court Judge Eilperin applied a two-step process to ascertain the best interests of T.J. First, he found by clear and convincing evidence that it was contrary to T.J.'s best interests for his mother, who had previously been adjudged incapable of caring for her child due to her mental illness, to withhold consent to his adoption. (App. *infra,* 36a). Then finding that it was in T.J.'s best interests permanently to remain in Petitioner's care rather than in the temporary care of the great-aunt, the judge found by a preponderance of the evidence that custody with Petitioner was in T.J.'s best interests. (App. *infra,* 36a-39a).

The trial court based its decision that withholding consent to the adoption was contrary to T.J.'s best interests on the evidence of "[T.J.'s] fierce attachment to [Peti-

tioner], the wonders she has accomplished with him, her extraordinary parental abilities, and the serious risk that pulling [T.J.] away from her will permanently scar his development." (App. *infra*, 37a). The court relied on the opinion of the "most informative and persuasive" expert who testified before it. It found that "[m]oving now, even to a home as caring as [the great-aunt's], would be a disaster because of the very real risk that in destroying his trusting attachment to [Petitioner], [T.J.] will be unable to trust anyone." (App. *infra*, 39a).

Judge Eilperin recognized that, if T.J. were placed in the custody of his great-aunt, he would participate in the comings and goings of his extended family. He ultimately found, however, that this factor was outweighed "by the real and substantial risk of harm should [T.J.] be removed from [Petitioner's] care." (App. *infra*, 38a). Accordingly, the Superior Court entered an order granting Petitioner's adoption petition on January 7, 1994.

A panel of the District of Columbia Court of Appeals reversed, holding that the trial court had applied the wrong evidentiary burden and legal standard. The Court of Appeals held, as a matter of Federal constitutional law, that the clear and convincing standard must govern *both* the question whether the mother's consent was withheld contrary to the best interests of the child *and* the question whether the mother's choice of custodian was binding. Specifically, the panel ruled:

> We now . . . hold that unless it is established that the parent is not competent to make such a decision, a child and the natural parents share a vital interest in preventing erroneous termination of their natural relationship, and, therefore, a parent's choice of a fit custodian for the child must be given weighty consideration which can be overcome only by a showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest.

(App. *infra,* 16a). In the panel's view, even when the parent is unable to care for the child, and has been found by clear and convincing evidence to have withheld consent to adoption contrary to the child's best interests, the parent's choice of a custodian must be given overriding weight. Under the panel's approach, the trial court "erred in placing the mother's wishes on an equal footing with the other factors it considered." (App. *infra,* 17a).

The appellate court did not remand. Instead, it found that the evidence presented below could not have satisfied the clear and convincing standard and that the mother's designation of a custodian would be contrary to T.J.'s best interests. (App. *infra,* 28a).

In reaching its conclusions, the panel disregarded the opinion of the expert whom the trial court found to be most credible and concluded on its own that, notwithstanding his opinion, there was not a significant risk of harm to T.J. if he were to be taken away from Petitioner's home. On this basis, the panel awarded custody to T.J.'s great-aunt.

On October 5, 1995, Petitioner filed a petition for rehearing *en banc.* The District of Columbia Court of Appeals, with two judges dissenting, denied her petition on April 17, 1996. (App. *infra,* 41a).

REASONS FOR GRANTING THE PETITION

As set forth below, the decision of the D.C. Court of Appeals involves an important question of federal law bearing on the extent to which the Constitution limits the *parens patriae* powers of the States to protect the best interests of children. The particular issue involved —the deference that must be given the choice of a custodian by a parent who has been adjudicated incapable of caring for a child—has not been resolved by this Court. This issue should be addressed by the Court because the resolution below places unjustified constitutional limits on the ability of States to determine the

appropriate balance of the rights of parents and the best interests of children. Moreover, the decision below conflicts with applicable decisions of this Court setting forth the appropriate scope of due process protections.

I. THE COURT SHOULD GRANT THIS PETITION BECAUSE THE DECISION BELOW EXTENDS THIS COURT'S PRECEDENTS IN AN UNSUPPORTABLE AND UNJUSTIFIED MANNER

In *Santosky v. Kramer,* 455 U.S. 745, 769 (1982), this Court concluded that, in a fact-finding proceeding to terminate parental rights, a State must prove its allegations by clear and convincing evidence. In its decision below, the Superior Court found that Petitioner had proved the factual basis for terminating the parental rights of T.J.'s mother by clear and convincing evidence. A panel of the D.C. Court of Appeals, however, concluded that this was insufficient. Relying on *Santosky,* it ruled that Petitioner was also required to prove by clear and convincing evidence that granting custody to the *designee* of T.J.'s mother was clearly contrary to T.J.'s best interests. In so holding, the D.C. Court of Appeals not only extended *Santosky* beyond its constitutional underpinnings, but also determined that the Constitution requires a burden of proof that has never been employed by this Court. The Court should grant the petition to correct this erroneous ruling.

A. The Constitution Does Not Require That a Foster Parent Seeking to Adopt a Child Prove by Clear and Convincing Evidence That Granting Custody to a Person Designated by the Parent Is Not in the Best Interests of the Child

The D.C. Court of Appeals rested its conclusions squarely on the recognition by this Court in *Santosky* of a natural parent's "fundamental liberty interest . . . in the care, custody, and management of their child." 455 U.S. at 753. Although the Court of Appeals looked

to precedent in the District of Columbia to provide further support for its conclusion, none of the cases cited provided an independent basis for the ruling. Similarly, the cases cited from other jurisdictions are neither determinative nor even persuasive. Indeed, as discussed in section III, States have reached widely differing conclusions about the weight to be accorded a parent's choice of custodian when the best interests of a child are at stake.[1] The validity of the ruling below must therefore rest on whether the "fundamental liberty interest" recognized in *Santosky* compels the burden of proof enunciated by the Court of Appeals.

In *Santosky*, this Court reiterated its conclusion in *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981), that, in determining the procedural protections due to parents in cases involving the termination of their parental rights, courts should apply the test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). 455 U.S. at 754. That test directs the balancing of three factors in order to determine when a state procedure comports with due process requirements: the private interests affected by the proceeding; the risk of error created by the procedure, and the countervailing governmental interest supporting use of the challenged procedure. *Id.*

The *Santosky* Court concluded that the balance of those factors dictated that a State, in a fact-finding proceeding to terminate parental rights, must prove its allegations by clear and convincing evidence. *Id.* at 769. Without examining these factors, the court below ex-

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[1] The lack of any general consensus on this issue also compels rejection of the clear and convincing evidence burden. As this Court has noted:

> [T]he principal reason for any constitutionally mandated departure from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions.

Rivera v. Minnich, 483 U.S. 574, 578 (1987).

tended the clear and convincing evidence requirement well beyond the burden borne by a State in a proceeding to terminate parental rights. The decision below went badly astray, profoundly misreading the requirements of due process. Had the court below examined the factors that this Court has held to be determinative, it could not have reached the same conclusion.

1. *The Nature of the Private Interests Affected by the Proceeding Does Not Compel the Application of an Extraordinary Burden of Proof*

With regard to the first factor—the private interest involved—the *Santosky* Court found that the parents' interest in the continued custody of their child was the only private interest implicated by the proceeding there at issue. 455 U.S. at 758-59. Here, however, the parental interest is far more attenuated. The mother's interest in the continued custody of T.J. was resolved when the trial court found by clear and convincing evidence that the best interests of T.J. compelled the termination of those rights. The only parental interest at issue is the parent's interest in designating the custodian of T.J. notwithstanding the termination of parental rights.

Moreover, the parental interest is not the only private interest affected by the proceeding. The interests of T.J. and his foster mother weigh heavily against a requirement giving the parent's choice of custodian overriding significance.[2] In contrast to *Santosky*, where "[t]he fact finding [did] not purport—and [was] not intended—to balance the child's interest in a normal family home against the parents' interest in raising the child," *id.* at 759, such a balancing was integral to the purpose of the proceeding

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[2] Although T.J.'s great-aunt is undoubtedly interested in the outcome of the proceeding, her legal interest is derivative of the mother's interest and it is independently entitled to no more weight than those of the foster parents in *Santosky*. The great-aunt is not related to T.J. by blood and has never provided more than brief custodial care for the child.

below.[3] Having concluded, by clear and convincing evidence, that T.J.'s mother was incapable of caring for him, the trial court (unlike the *Santosky* trial court) was free to consider that the interests of T.J. and his mother might thereafter diverge. *See id.* at 760. As the California courts have recognized, the promise of adoption into a stable and permanent family relationship dramatically alters the child's interest in the proceeding. *See* discussion at section II, *infra.* The California Court of Appeals has noted:

> the likelihood of adoption . . . changes the relative severity of the consequences of an erroneous decision on the child. With the likelihood of adoption, the child is subject to a dramatically different set of outcomes as a result of the termination hearing than was the case in *Santosky* or *Angelia P.* Instead of a bleak future in foster care limbo on the one hand, and return to a possibly abusive household on the other, the likelihood of adoption effectively realigns the consequences of an erroneous decision in termination proceedings: The alternatives are now life with a stable family who have already sacrificed for the sake of the child's well-being versus life with (more often than not) a single parent to whom return of the child has been repeatedly shown to be detrimental.

In re Cristella C., 8 Cal. Rptr. 2d 342, 346 (Cal. Ct. App. 1992).

Further, unlike *Santosky*, the instant case is not a state-initiated proceeding in which the foster parents' rights were "not implicated directly in the fact finding stage." 455 U.S. at 761. Rather, the adoption proceeding was brought by the foster mother, and pitted her interests directly against those of the other parties. The interests of T.J.'s foster mother are very much at stake in this proceeding. The *Santosky* Court noted that the

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[3] As noted above, however, the parental interest being balanced is different—designating the custodian of the child rather than raising the child.

foster parents could make their case for custody at the dispositional stage of the proceeding, or could bring their own action for custody. *Id.* at 761. Yet that was exactly what the foster mother did in the proceeding below. If the designation of a custodian by T.J.'s mother is to prevail over the trial court's conclusion that adoption by Petitioner is in the child's best interests, then Petitioner's interests will be just as completely and permanently terminated as would those of the parent in *Santosky*.

The interests of the foster parents cannot be dismissed lightly. As this Court has stated:

> [B]iological relationships are not exclusive determina[nts] of the existence of a family. . . .
>
> . . . [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deep and loving interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 843-44 (1977) (citation omitted). The trial court found that T.J. has made "great strides" in his foster mother's care, and has progressed "from an aggressive, disruptive, troubled child to a little boy who has a sense of trust and security in the world." (App. *infra*, 34a). It concluded that T.J.'s attachment to his foster mother is "intense and unique," and that his re-

moval from foster care would likely "permanently scar his development." (App. *infra*, 37a). To dismiss as inconsequential the interests of T.J.'s foster mother in this proceeding would exalt the biological relationship at the expense of a State's ability to recognize the same emotional relationships and socializing functions that this Court has recognized as important. *Smith*, 431 U.S. at 843-44. Under such circumstances, the nature of the private interests involved cannot be said to weigh in favor of the Constitution's imposing an extraordinary burden of proof on a foster parent who challenges a parent's designation of a custodian.

2. *The Risk of the Erroneous Deprivation of Private Interests Is Not Such As to Justify an Extraordinary Burden of Proof*

Santosky's analysis of the second *Mathews* factor—the risk of the erroneous deprivation of private interests—reveals another error in the analysis undertaken below. The *Santosky* Court was concerned that "[t]he State's ability to assemble its case almost inevitably dwarfs the parents' ability to amount a defense." 455 U.S. at 763.[4] In the proceeding below, the District of Columbia was not attempting to terminate the rights of T.J.'s mother. Indeed, it was not even a party to the adoption and custody proceedings and the D.C. professional case worker testified in favor of custody with T.J.'s great-aunt.[5] Even a cursory review of the proceedings below reveals that the lawyers, experts and other resources employed by those favoring custody with T.J.'s great-aunt were no less, and perhaps more, than those available to

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[4] Indeed, this Court has noted that the cases in which it has applied a higher standard than a preponderance of the evidence have involved conflicts between the state and individuals. *Rivera v. Minnich*, 483 U.S. at 581.

[5] *Cf.* 455 U.S. at 763 (expert representation and professional social workers available to State in termination proceeding). Although the District of Columbia was a party to the initial neglect proceeding, it was not seeking a termination of parental rights.

Petitioner. (*See* App. *infra*, 10a-12a). Each side presented three expert opinions. No fewer than three lawyers advocated custody with the aunt. Similarly, while T.J.'s parent and great-aunt would have no protection against future governmental efforts to intervene, *see id.* at 764, neither would T.J.'s foster mother, should she prevail.

Indeed, a holding that the Constitution mandates imposition of an extraordinary burden of proof on foster parents creates an unacceptable risk that the consequences of an erroneous decision will be borne by T.J. Unlike the situation in *Santosky*, where the likely consequence of an erroneous failure to terminate parental rights was "an uneasy status quo," 455 U.S. at 766, an erroneous grant of custody to the great-aunt would wrench T.J. from the only home he knows. The trial court's finding that removal from Petitioner's home would likely "permanently scar" T.J.'s development was not disturbed by the D.C. Court of Appeals. Nothing in the record suggests any comparable harm to T.J.'s mother or great-aunt.

In sum, once the basis for the termination of parental rights has been established by clear and convincing evidence, a State must have the latitude to fashion the appropriate distribution of the risk of erroneous decisions according to the State's assessment of the competing interests and the various circumstances under which those interests clash. Imposing an extraordinary burden would force children and foster parents to bear the majority of the risk without regard to severity of the potential harm. The allocation of risks cannot be said to argue in favor of the decision below.

3. *The Nature of the State's Interest Argues Against an Extraordinary Burden of Proof*

Finally, the State's interest is not well-served by requiring that a parent's choice of custodian can only be overcome by clear and convincing evidence that the choice is

clearly contrary to the child's best interests. Although the State is not prosecuting the termination of parental rights in an adoption proceeding, the State's interest remains the same: "*a parens patriae* interest in preserving and promoting the welfare of the child." 455 U.S. at 766.[6]

The *Santosky* Court acknowledged the validity of a State's goal to provide a child with a permanent home, but stated that such a goal must yield to preservation of natural familial bonds "while there is still reason to believe that positive, nurturing parent-child relationships exist." *Id.* at 766-67. The State's interest in finding an alternative home "arises . . . 'when it is clear that the natural parent cannot or will not provide a normal family home for the child.'" *Id.* at 767 (citation omitted). In this case, the trial court found, by clear and convincing evidence, that T.J.s mother could not provide a normal home. Under such circumstances, the States *parens patriae* interest in promoting the best interests of the child should be on equal, if not higher, footing than any residual interest of the mother in designating the child's custodian. The third *Mathews* factor, therefore, like the first two, argues against packing an extraordinary burden of proof on foster parents seeking to adopt.

4. *The Court Should Reject the D.C. Court of Appeals' Erroneous Balancing of the Mathews Factors*

The D.C. Court of Appeals bypassed the due process analysis mandated by this Court in *Mathews* and *Lassiter*,

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[6] The *Santosky* Court also noted the State's "fiscal and administrative interest in reducing the cost and burden of [termination] proceedings." 455 U.S. at 766. To the extent that fiscal and administrative interests are relevant in the instant proceeding, they heavily favor the facilitation of adoption, which will put an end to the State's fiscal burden of supporting the child and end the administrative burden of continued litigation and supervision through neglect proceedings.

and misconstrued the holding of *Santosky*, when it invoked—but did not analyze—the "fundamental right" of a parent in order to sustain a requirement that a parent's designation of a custodian can only be overcome by clear and convincing evidence. The result is an erroneous restriction on the ability of States to "experiment with various remedies" seeking "satisfactory solutions to the painful problem of child abuse and neglect." *Santosky*, 455 U.S. at 771 (Rehnquist, J., dissenting). As the dissent noted in *Santosky*, "the Court has scrupulously refrained from interfering with state answers to domestic relations questions . . . . '[S]ubstantial weight must be given to the good-faith judgments of the individuals [administering a program] . . . that the procedures they have provided assure fair consideration of the . . . claims of individuals.'" *Id.* (citation omitted). Although these concerns were overcome in *Santosky* by the need to protect the rights of parents, they must not prevail in this instance, where the *Mathews* analysis shows that the parental interest is limited and outweighed by many other, more substantial, interests.

If the court's decision below were based on D.C. statutes, or judicially-derived principles of D.C. law, there would be no occasion for this Court to review it. By instead basing its decision on constitutional due process protections, the D.C. Court of Appeals has called into question the ability of the fifty States to take contrary positions. The Court should reject an approach that could tend toward "the federalization of family law." *Santosky*, 455 U.S. at 773. As the Chief Justice further noted in his *Santosky* dissent:

> Such a trend will only thwart state searches for better solutions in an area where this Court should encourage state experimentation. 'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This

> Court has the power to prevent an experiment.' *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 . . . (1932) (Brandeis, J., dissenting). It should not do so in the absence of a clear constitutional violation.

Id.

B. The D.C. Court of Appeals Imposed a Burden of Proof That Goes Beyond Any Due Process Requirement Recognized By This Court

Finally, the implications of the lower court's imposition in family court proceedings of a new, hitherto unknown, burden of proof provide an additional reason for the Court to grant this Petition. The D.C. Court of Appeals did not merely rule that Petitioner must show by clear and convincing evidence that the mother's designation of a custodian was not in the best interests of T.J., but rather held:

> a parent's choice of a fit custodian for [a] child must be given weighty consideration which can only be overcome by a showing, *by clear and convincing evidence*, that the custodial arrangement and preservation of the parent-child relationship is *clearly* contrary to the child's best interest.

(App. *infra*, 16a) (emphasis added). The burden thus established by the D.C. Court of Appeals is unique. Petitioner is unaware of any case where this Court, or any court, has found that the Constitution requires a factual premise to be proved "clearly" *and* "by clear and convincing evidence." This Court has repeatedly recognized only three burdens of proof in trial courts: a preponderance of the evidence; clear and convincing evidence; and beyond a reasonable doubt. *See, e.g., California ex rel. Cooper v. Mitchell Bros.*, 454 U.S. 90, 93 (1981). The burden created by the D.C. Court of Appeals, however, is somewhere in between—apparently greater than simple proof by clear and convincing evidence—but is presumably less than proof beyond a reasonable doubt.

Although not presenting the same hybrid of appellate and trial standards, the burden created by the D.C. Court of Appeals is no more coherent than that rejected by this Court in *Concrete Pipe and Prods. of California, Inc. v. Construction Laborers Pension Trust Fund for Southern California*, 508 U.S. 602, 113 S. Ct. 2264 (1993). The Court equated the standard in that case with a trial standard of "probably true beyond a reasonable doubt." 508 U.S. at ——, 113 S. Ct. at 2281. "Clearly" contrary to a child's best interests, proved by "clear and convincing evidence," is no less absurd merely because both components point in the same direction. The Court should reject constitutional interpretations that will only yield confusion.

II. THE COURT SHOULD GRANT THIS PETITION TO RESOLVE DIVERGENT DETERMINATIONS OF THIS ISSUE BY STATE COURTS

Only a few state courts have addressed the issue of whether the "clear and convincing evidence" requirement of *Santosky* applies to other issues in adoption and custody proceedings, such as the fitness of a custodian designated by a parent. Unlike the D.C. Court of Appeals, however, those courts have generally recognized that extending that requirement to the designation of custodians or other post-termination issues would inappropriately and unnecessarily restrict the States' ability to exercise their *parens patriae* powers.

At least one other State's high court has explicitly refused to extend *Santosky's* protections to a parent's right to designate the child's custodian. The West Virginia Court of Appeals considered such a designation irrelevant when sufficient grounds existed to terminate parental rights. *Nancy Viola R. v. Randolph W. and Grady W.*, 356 S.E.2d 464, 470 n.9 (W. Va. 1987).[7] Similarly, in

[7] In *Nancy Viola R.*, the termination of parental rights was based on a finding of unfitness. The D.C. Court of Appeals tried to dis-

a case predating *Santosky*, the Appellate Division of the New Jersey Superior Court concluded that, even though parental rights could not be terminated absent clear and convincing evidence of very substantial neglect, the fitness of a custodian preferred by the parents was irrelevant to that determination. *J. and E. v. M. and F.*, 385 A.2d 240 (N.J. Super. Ct. App. Div. 1978).

Similarly, the California Supreme Court has refused to extend *Santosky* beyond its due process underpinning to other aspects of custody and adoption proceedings. In *Cynthia D. v. San Diego County Dep't of Social Servs.*, 851 P.2d 1307 (Cal. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1221 (1994), that court rejected arguments that the clear and convincing evidence standard applied not only to the determination of the factual predicate for termination, but also to subsequent findings. Petitioners in *Cynthia D.* contended that the California statutory scheme, which requires a finding of clear and convincing evidence when the child is initially removed from the home, violated the requirements of *Santosky* because it failed also to require proof by clear and convincing evidence of necessary findings later in the proceedings that the return of the child to the home would be detrimental. In a carefully reasoned opinion, applying the *Mathews* analysis that the D.C. Court of Appeals eschewed, the California Supreme Court concluded that due process did not dictate such a burden. Particularly relevant is the court's analysis of the private interests at stake. The court pointed out that, at the "selection and implementation"

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tinguish this case, in which the finding of neglect was based on the parent's mental illness, from a case where a parent has been found abusive or unfit. (App. *infra*, 23a). The D.C. Code, however, does not differentiate neglected children according to the basis for the neglect finding. Any finding of neglect under D.C. Code § 16-2301(9) can provide the prerequisite for the termination of parental rights. The suggestion of the D.C. Court of Appeals that constitutional rights should be determined by distinctions that have no statutory basis only highlights the confusion that could arise from the decision below.

stage, when parental inadequacy has already been established, the interests of the parent and child have diverged. *Cynthia D.*, 851 P.2d at 1314. Especially when adoption is likely, the child's "fundamental interest in the opportunity to experience a stable parent-child relationship" was very much at stake. *Id.*[8] Nowhere is such likelihood greater than in an adoption suit, such as the proceeding below.

The ruling below thus conflicts with the decisions of courts in several States, which declined to recognize the constitutional entitlement upon which the decision below rested.

III. THE COURT SHOULD GRANT THIS PETITION TO CLARIFY THE IMPORTANT QUESTION OF THE SCOPE OF CONSTITUTIONAL IMPEDIMENTS TO THE STATES' EXERCISE OF THEIR PARENS PATRIAE POWERS

The proceeding giving rise to this Petition provides the Court with the opportunity to clarify the extent to which the Constitution limits the ability of States, in the exercise of their *parens patriae* powers, to determine the appropriate balance between the best interests of a child and the parent's interest in controlling the custodial circumstances of that child. The scope of the constitutional protection due interests of parents, when confronted by the interests of children or the *parens patriae* power of the States, is an issue of extreme moment that has been addressed by this Court in a variety of contexts.[9]

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[8] *See also In re Cristella C.*, where the California Court of Appeal asserted that "[g]iven the fundamental choice in such a case as this—when a stable family is likely to adopt unless there is an erroneous nontermination—we cannot believe that the *Santosky* majority . . . and (most certainly) the *Santosky* dissenters, would not agree with us that the relative severity of the consequences of an erroneous decision—one way or the other—are at least roughly equal." 8 Cal. Rptr. 2d at 347.

[9] *See, e.g., Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (State may require minor seeking abortion in

Although this Court has determined that due process requires the factual basis of a termination of parental rights to be proven by clear and convincing evidence, it has not extended that burden to such additional factual determinations as the fitness of a custodian designated by the parent. The Court should grant this Petition to provide guidance regarding limitations imposed by the Federal Constitution on the States' authority to make those determinations in the best interests of the child.

Not surprisingly, state courts have been called upon to balance the competing interests of parental rights and a child's welfare in diverse factual and statutory circumstances, and have reached very different conclusions. Only rarely have state courts been called upon to go beyond *Santosky* in determining burdens of proof when balancing a parent's preferences against the child's best interest in the context of the termination of parental rights. Nonetheless, the inconsistency of these decisions demonstrates the diversity of the States' exercise of their *parens patriae* powers.

As discussed in section II, *supra*, courts in California and West Virginia, addressed this issue in the constitutional context. In these cases, the best interests of the child prevailed. Two other States, without reaching constitutional issues, gave less weight to the child's best interests, concluding that more than clear and convincing evi-

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ex parte proceeding to justify parental bypass by clear and convincing evidence); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (State requirement that both parents be notified of abortion unconstitutional); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (State may determine burden that parental guardians must meet in order to terminate life support of comatose child); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Interest of natural father subordinate to state interest in preserving traditional familial relations through presumption of legitimacy); *Parham v. J.R.*, 442 U.S. 584 (1979) (State may allow parents to make certain decisions regarding the commitment of mentally ill minors); *Qulloin v. Walcott*, 434 U.S. 246 ((1978) (State need not allow natural father to veto adoption of child).

dence of neglect or abandonment is necessary before the State will terminate parental rights over a parent's objection. The Court of Appeals of Kentucky has held that when considering a petition to adopt a child without a parent's consent based on abandonment or neglect, the court must require clear and convincing evidence that the parent wilfully engaged in such conduct. Proof of mental incompetence or incarceration does not suffice, even when it would be "the cruelest act a court could perform" to return the child to the mother. *D.S. v. F.A.H. and M.A.H.*, 684 S.W.2d 320, 321, 323 (Ky. Ct. App. 1985). In *Martin v. Putnum*, both parents were incompetent to care for their child due to their severe mental disorders and incarceration. 427 So. 2d 1373 (Miss. 1983). The adequacy of the proof that they could not care for their child does not appear to have been in issue. The court below found that, even though a grandparent requested custody, adoption was in the best interests of the child. Nonetheless, the Supreme Court of Mississippi overturned the adoption, noting that the parent withheld consent. *Id.* at 1377.[10]

In other contexts, States have taken very different approaches to addressing conflicts between parents' wishes and the States' *parens patriae* concern for the best interests of the child. For example, in *Worley v. Jackson*, involving a mother who was unable to care for her children because she was incarcerated, the Supreme Court of Mississippi awarded custody to the party opposed by the mother over the mother's preference for an alternate custodian. 595 So. 2d 853 (Miss. 1992). Apparently adhering to a best interest of the child standard, the court stated that the mother was "unable to care for [her]

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[10] *See also Logan v. Fairfax County Dep't of Human Dev.*, 409 S.E.2d 460 (Va. Ct. App. 1991) (acknowledging mother's standing to challenge adequacy of court's compliance with statutory requirement to consider placement with relatives, even though mother's rights were terminated in proceeding and mother did not request such consideration).

children" and rejected the argument that her designation should be honored because it "was a legitimate exercise of her right and duty to control her children." *Id.* at 855. *See also Commissioner of Social Servs. ex rel. Riddle v. Rapp,* 487 N.Y.S.2d 477 (Family Ct. N.Y.C. 1985) (In determining a child's placement pending a termination of parental rights proceeding, the court placed no weight on the mother's preference for discharge to the mother's family, extending the placement with the foster parents); *State in Interest of L.L.,* 625 A.2d 559 (N.J. Super. Ct. App. Div. 1993) (In refusing to remove the child from long-term foster care because it was not in the child's best interests, the court gave no special weight to the incarcerated father's designation of his relatives as custodians).[11]

In contrast, the Supreme Judicial Court of Massachusetts has held that, at least where neither the parent nor the designated custodian has been found unfit or unsuitable, the judge is bound to honor his or her wishes on the choice of guardian. *Freeman v. Chaplic,* 446 N.E.2d 1369, 1375 (Mass. 1983) (concluding that granting custody to a suitable party opposed by the fit parents would not measurably advance any interest of the State and would raise serious constitutional difficulties).

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[11] A number of decisions predating *Santosky* reached similar conclusions. *See In re Cooper,* 410 P.2d 475 (Utah 1966) (mother's preference for custodian, entitled to due consideration by statute, rejected because such preferences "cannot be made absolutely controlling" when balanced against the best interests of the child); *Akin v. DeBerry,* 290 S.W.2d 388 (Tex. Cir. App. 1956) (holding that the desire of either parent is not controlling in a custody case); *Scanlon v. Scanlon,* 102 A.2d 656 (N.J. Super. Ct. App. Div. 1954) (where mother was incompetent to care for her child due to mental illness, court chose foster care over mother's preference for a custodial arrangement with relatives); *Stanley v. Whitney,* 259 S.W.2d 636 (Tx. Civ. App. 1953) (desires of the parent as to child's custodian are not controlling when conflicting with best interests of the child).

The choice faced in these cases between a child's best interest and deference to a parent's choice of custodian is only one example of the many conflicts between the States' exercise of their *parens patriae* powers and other competing interests. For example, States must determine how much weight to give a deceased parents preferences,[12] to a parental desire to place the child for adoption,[13] and to parental preferences as to foster placement.[14] As this Court has noted, the decisions to be made in such circumstances have been entrusted, under our constitutional scheme, to the States. "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family . . . arrangements." *U.S. v. Yazell*, 382 U.S. 341 (1966). *See also Rivera v.*

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[12] *See, e.g., Lamar v. Zimmerman*, 169 N.W.2d 819 (Iowa 1969); *In re Guardianship of the D. Children*, 576 N.Y.S.2d 136 (N.Y. App. Div. 1991), *appeal dismissed*, 590 N.E.2d 247 (1992); *Merrill v. Berlin*, 54 N.E.2d 674 (Mass. 1944). In the same context, a deceased parent's designation has been held as not dispositive or it has not been given greater weight than the best interest of the child. *State ex rel. Van Loh v. Prosser*, 98 N.W.2d 329 (S.D. 1959); *In re Lewis*, 152 A.2d 666 (Pa. 1959); *In re Lippincott*, 124 A. 532 (N.J. Ch. 1924), *aff'd*, 128 A. 254 (N.J. 1925).

[13] *See State ex rel. Fisher v. Devins*, 200 N.W.2d 28 (Minn. 1972) (best interest of child prevailed over mother's preference); *Sickler v. Roach*, 564 N.Y.S.2d 603 (N.Y. App. Div. 1991) (court followed parent's choice to surrender child to agency rather than grant custody to grandparent).

[14] *See, e.g., In re Welfare of Key*, 836 F.2d 200, 202 (Wash. 1992) (mother of severely physically handicapped child had statutory right to veto foster placement unless State can prove, by "clear, cogent and convincing evidence," that its choice of custodian was in the "best welfare of the child"), *cert. denied*, 507 U.S. 927 (1993); *Hope E. H. v. Margaret R.*, 1994 WL 811750 (Del. Fam. Ct. 1994), (custody taken from foster parents, with no proof of neglect, because court "must place substantial weight upon the natural parents' wishes as to the custodial and residential arrangements of their minor child"); *Bernhardt v. Lutheran Social Servs. of the Nat'l Capital Area, Inc.*, 385 A.2d 1197 (Md. Ct. Spec. App. 1978) (a parent's desires were "relevant evidence" in withdrawing child from foster placement).

Minnich, 483 U.S. at 582 (O'Connor, J., concurring); *Santosky*, 455 U.S. 352 at 771 (Rehnquist, J., dissenting). The Court should act to prevent extensions of the reach of the Constitution into such areas. It is for these reasons that it behooves the Court to grant this petition—not to establish the standards States must apply when evaluating a parent's designation of a custodian—but to clarify that the Constitution does not limit the ability of States to establish their own priorities in the exercise of their *parens patriae* powers.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

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